UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOSE DEL-ORDEN, on behalf of himself and all others similarly situated,	:	Case No.: 16-cv-2361:
	:	
Plaintiff,		
	:	
-against-		
	:	
EATALY AMERICA, INC..,		
	:	
Defendant.		

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DEFENDANT'S MEMORANDUM OF LAW OFFERED IN OPPOSITION TO THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF THE DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT

Respectfully submitted,

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This memorandum of law is respectfully submitted both in opposition to the plaintiff's motion for summary judgment and in support of the defendant's cross motion to dismiss for failure to state a cause of action or alternatively for summary judgment dismissing the plaintiff's complaint.

PRELIMINARY STATEMENT

This case arises from allegations that the Eataly America, Inc. ("Eataly") failed to comply with, *inter alia,* Title III of the Americans with Disabilities Act (ADA) and discriminated against the plaintiff by failing to have its internet site comply with certain "guidelines" for ease of use for the blind. Under Title III of the ADA, no individual may be discriminated against on the basis of disability with regards to the full and equal enjoyment of the goods, services, facilities, or accommodations of any "place of public accommodation" by any person who owns, leases, or operates a place of public accommodation. Plaintiff also relies on certain state and municipal codes that follow the federal model. Here, the plaintiff argues (in error) that an internet site is such a place of public accommodation. The plaintiff argues that the defendant owns and operates multiple stores and restaurants and that it also maintains an internet web site through which the goods and services of Eataly's physical stores and restaurants are offered for sale. Because the plaintiff had difficulty independently navigating the web site, due to his blindness, he maintains that he has been discriminated against under the terms of Article III and the various state and municipal codes. He seeks statutory damages and his attorneys seek to recover their legal fees. The internet web site, however, is not a part of Eataly's restaurant or store operations. Because there is no nexus between the physical location and the internet web site, the plaintiff's cause of action must fail.

In moving for summary judgment, the plaintiff seeks – quite literally – to have the court punish Eataly for failing to comply with guidelines that have never been promulgated and enacted as legally binding regulations pursuant to law, or for failing to comply with regulations that apply only to government entities. Because the guidelines cited by the plaintiff have not been published in the Federal Register, because they have not been open to public comment and because they have not been enacted pursuant to terms of the Administrative Procedures Act, they cannot be enforced against Eataly without violating the due process guarantees found in the Fifth and Fourteenth Amendments to the Constitution. Likewise, as Eataly is not a government agency, it cannot be punished for failing to follow regulations specifically adopted solely for government agencies. For this reason, the court should dismiss the plaintiff's complaint.

The plaintiff's counsel argues that Eataly's web site (Eataly.com) is a place of public accommodation under the terms of the ADA and under the terms of the state and municipal codes. Counsel is in error. Like the state and municipal codes, the ADA defines what is a "place of public accommodation" and the defendant's web site simply does not meet that statutory definition. Likewise, pursuant to the terms of the ADA, the Department of Justice is empowered to enact regulations to implement the policies enunciated by Congress when it enacted Title III of the ADA. The DOJ's regulations, likewise, define what is to be considered a "place of public accommodation". Those regulatory definitions do not include internet web sites.

The plaintiff also argues that there is a nexus between Eataly's web site and its physical retail stores and restaurants. This too is error, as the web site is not necessary for accessing the various retail stores or restaurants operated by Eataly. In cases where courts have found a nexus between a web site and a physical place of public accommodation, the web site was determined to be necessary for an individual to access that physical public accommodation. In the case at bar, Eataly's web site is separate and apart from the restaurants and retail outlets operated by Eataly. A person does not have to use the web site to access or otherwise use the restaurants and retail facilities that Eataly owns and operates. For these reasons, the court should deny the plaintiff's motion. The court should instead grant Eataly's cross motion and dismiss the complaint.

ARGUMENT

POINT I: STANDARD OF REVIEW

(a) Motion to Dismiss for Failure to State a Cause of Action

The standard of review on a motion to dismiss for failure to state a cause of action is well settled. "In order to withstand a motion to dismiss, a complaint must plead 'enough facts to state a claim for relief that is plausible on its face.'" *Patane v. Clark,* 508 F.3d 106, 111-12 (2d Cir. 2007) (*quoting Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 [2007]). "[A]lthough 'a court must accept as true all of the allegations contained in a complaint,' that 'tenet' 'is inapplicable to legal conclusions,' and '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Harris v. Mills,* 572 F.3d 66, 72 (2d Cir. 2009) (*quoting Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). Ultimately, "[t]he plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal,* 556, U.S., at 678 (quotation marks omitted). "Plausibility thus depends on a host of considerations: the full factual picture presented by the complaint, the particular cause of action and its elements, and the existence of alternative explanations so obvious that they render plaintiff's inferences unreasonable." *Fink v. Time Warner Cable,* 714 F.3d 739, 741 (2d Cir. 2013) (per curiam) (citation omitted).

(b) Motion for Summary Judgment

The standard of review on a motion for summary judgment is also well settled. Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

To defeat summary judgment, a plaintiff "may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Here, the undisputed facts show that the plaintiff has no cause of action under Title III of the ADA, or under the state causes of action, as he has not been discriminated against with regard to any "place of public accommodation", as that term is defined by statute and by regulation.

POINT II: INTERNET WEBSITES ARE NOT "PLACES OF PUBLIC ACCOMMODATION" AS DEFINED BY TITLE III OF THE ADA

Each of the plaintiff's five causes of action rests on the allegation that the defendant's internet web site is a place of public accommodation. As a matter of law, if the web site is not a "place of public accommodation" as established by the definitions contained in Title III of the

> (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
>
> (B) a restaurant, bar, or other establishment serving food or drink;
>
> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
>
> (D) an auditorium, convention center, lecture hall, or other place of public gathering;
>
> (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
>
> (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
>
> (G) a terminal, depot, or other station used for specified public transportation;
>
> (H) a museum, library, gallery, or other place of public display or collection;
>
> (I) a park, zoo, amusement park, or other place of recreation;
>
> (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
>
> (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
>
> (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. § 12181(7). The language of Section 12181 is not open ended. It lists 12 specific commercial establishments and other related physical places. This precise statutory definition makes no mention of virtual space, nor does it allude to the internet in any way. In 1990, when the ADA was enacted, the internet was young, but it was not unknown. In fact, the internet

traces its roots to research commissioned by the federal government in the 1960s, and by 1990 internet security had already become an issue of public concern.[1] It should be presumed, therefore, that Congress – which controls the purse strings of the federal government – was cognizant of current and emerging technologies when it passed the ADA in 1990. This is especially true when Congress provided the funding for the development of that technology. Thus, had Congress wanted to include internet or world wide web sites within the legislation, it would have done so.

Whether Eataly's website is a "place of public accommodation," as contemplated by Section 12181, should be resolved in the first instance by referring to the plain reading of the statute. This is where the court should begin its analysis. *See, e.g., Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). In *Robinson,* the Court considered the question of whether a former employee qualified as an "employee" within the meaning of Title VII of the Civil Rights Act of 1964. With regard to its analysis, the Court stated as follows:

> "Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent."

Robinson, 519 U.S., at 339.

The word "place" has a particular meaning. It is defined as "physical environment" "space" and "physical surroundings" (Webster's Ninth New Collegiate Dictionary, 1985, at p.897). The word place denotes physical, three dimensional space. Therefore, under the plain

[1] *See,* IPTO - Information Processing Techniques Office, The Living Internet, Stewart, B. (ed) Jan. 2000, available online at http://www.livinginternet.com/i/ii_ipto.htm (last reviewed 03/14/2017); *see also,* Science Academy Urges More Computer Security, Markoff, J. New York Times, 12/06/1990, available online at http://www.nytimes.com/1990/12/06/business/science-academy-urges-more-computer-security.html (last reviewed 03/14/2017).

and unambiguous language of Title III of the ADA, Eataly's web site (Eataly.com) is not a place of public accommodation. The Ninth Circuit has held that a place of public accommodation is just that, a physical space. *Wayer v. Twentieth Century Fox Film Corp.,* 198 F. 3d 1104, 1114-15 (9th Cir. 2000). The court explained that "The principle of *noscitur a sociis* requires that the term, 'place of public accommodation,' be interpreted within the context of the accompanying words, and this context suggests that some connection between the good or service complained of and an actual physical place is required." 198 F. 3d, at 1114. The Sixth Circuit used the same analysis to conclude that a "place of public accommodation" is a physical space and that it does not include a long term disability plan. *Parker v. Metro. Life Ins. Co.,* 121 F. 3d 1006, 1014 (6th Cir. 1994). The Third Circuit is in accord. *See, Ford v. Schering-Plough Corp.,* 145 F. 3d 601, 612 (3d Cir. 1998).

It is respectfully submitted that because Title III is coherent and consistent, and because the language of Section 12181 is clear and unambiguous, this is where the court's analysis should begin and end. Other courts have explicitly held that the language of Section 12181 is plain and unambiguous and does not include internet websites. *See, e.g., Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1317-18 (S.D. Fl. 2002) (reasoning that to expand the ADA "[t]o cover 'virtual' spaces would be to create new rights without well-defined standards"); *see also, Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1241 (11th Cir. 2000) ("[b]ecause Congress has provided such a comprehensive definition of 'public accommodation,' we think that the intent of Congress is clear enough").

In addition to its statutory provisions, the ADA also grants authority to the Attorney General to issue regulations to carry out the policy provisions of the ADA. The applicable federal regulations also define a "place of public accommodation" as "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the [twelve (12) enumerated categories set forth in 42 U.S.C. § 12181(7)]". 28 C.F.R. § 36.101. To be a facility falling within one of the 12 enumerated categories set forth in section 12181(7) would necessitate a physical premise. Extending the definition to include an internet web site would be contrary to the overall scheme adopted by Congress, which speaks only of physical, tangible places and things. The same federal regulation also defines the term "facility" as follows:

> "Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located."

28 C.F.R. § 36.101.

In interpreting the plain and unambiguous language of Title III of the ADA, and its corresponding federal regulations, courts have recognized Congress' clear intent that Title III governs solely access to physical, concrete places of public accommodation. *See, e.g., Rendon v. Valley Crest Products,* 294 F.3d 1279, 1283 (11th Cir. 2002); *Stevens v. Premier Cruises, Inc.,* 215 F.3d 1237, 1241 (11th Cir. 2000) (noting that "because Congress has provided such a comprehensive definition of 'public accommodation,' we think that the intent of Congress is clear enough"). Where Congress has created specifically enumerated rights and expressed the intent of setting forth "clear, strong, consistent, enforceable standards," courts should follow the law as written and wait for Congress to adopt or revise legislatively-defined standards that apply to those rights. Here, to fall within the scope of the Title III, as the law is presently drafted, a public accommodation must be a physical, concrete, tangible place or structure.

Throughout his moving papers, the plaintiff cites to *Pallozzi v. Allstate Life Insurance Co.* (198 F.3d 28 [2d Cir, 1999]) to support his argument that a public accommodation need not be a public place. *Pallozzi,* however, is distinguishable from the case at bar. The court in *Pallozzi* dealt with the issue of whether an insurance company selling insurance policies is governed under the ADA. Specifically, the court considered the defendant insurance company's refusal to sell a life insurance policy to two plaintiffs based on their pre-existing psychiatric conditions (i.e., major depression and borderline personality disorder). The court did not deal with the issue of whether an internet web site constitutes a place of public accommodation. Instead it acted to prevent actual discrimination against the disabled who were openly denied the ability to purchase insurance coverage, or more specifically, the "goods and services" available through an "insurance office".

The court began its analysis by recognizing that Title III specifies an "insurance office" as a place of public accommodation. The court then went on to discuss how the defendants attempted to justify their refusal to sell their goods and services to the disabled plaintiffs. The court reasoned as follows:

> "We start with the fact that Title III specifies an 'insurance office' as a 'public accommodation.' Section 302(a) bars a 'place of public accommodation' from 'discriminating against [an individual] on the basis of disability in the full and equal enjoyment of [its] *goods* [and] *services*.' 42 U.S.C. §§ 12181(7)(F), 12182(a) (emphasis added). The most conspicuous 'goods' and 'services' provided by an 'insurance office' are insurance policies. Thus, the prohibition imposed on a place of public accommodation from discriminating against a disabled customer in the enjoyment of its goods and services appears to prohibit an insurance office from discriminatorily refusing to offer its policies to disabled persons, subject to the safe harbor provision of Section 501(c) of Title V. *See Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (Posner, *C.J.*) (absent special circumstances, Title III of the ADA prohibits an insurance

> company from refusing to sell an insurance policy to a disabled person by reason of the person's disability)."

Pallozzi, 198 F.3d, at 31-32. Thus, in *Pollizzi,* the court found against the defendants primarily because they had violated Title III's prohibition against discriminating against disabled persons by refusing to sell their goods and services. The court noted that there was a nexus between the defendant's goods and services and the discriminatory refusal to sell those goods and services to the plaintiffs. This offers little if any support for the proposition that a "place of public accommodation" may include an internet web site. In fact the court's holding in *Pollizzi* was narrow. It held as follows:

> "Title III does regulate the sale of insurance policies in insurance offices, subject to the limitations of the safe harbor provision in Section 501(c) of Title V. As we base our holding on the statutory text--which, we find, unambiguously covers insurance underwriting in at least some circumstances--we need not consider Plaintiffs' arguments that the ADA's legislative history and the interpretive guidelines issued by the Department of Justice confirm this interpretation."

The court's decision and reasoning were also influenced by the specific issues of the insurance industry. For example, the court reasoned that under Title V of the ADA, Section 501(c), there is a safe harbor provision which asserts that Titles I through III "shall not be construed to prohibit or restrict-(1) an insurer from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law…." *Pallozzi,* 198 F.3d, at 30. The court then reasoned that if Title III did not apply to insurance policies, this safe harbor provision would not be needed. *Id.* Therefore, the *Pallozzi* decision should be limited to its narrow holding, and it should not be applied expand the reach of the statute to cover internet web sites.

POINT III: NEITHER THE ADA NOR THE CORRESPONDING REGULATIONS PROVIDE FOR THE REGULATION OF INTERNET AND WEBSITES

The guidelines cited by the plaintiff in the complaint are related to the Web Accessibility Initiative ("WAI"). This is an initiative of the World Wide Web Consortium to improve the accessibility of the World Wide Web for people with disabilities. The consortium is not a government agency and has no regulatory powers. It has no relation to the ADA. The guidelines are industry recommendations and they do not carry the force of law. As such, it would be wrong to punish Eataly for not complying with these guidelines.

Likewise, Plaintiff cites to Section 508 of the Rehabilitation Act (*see,* Plaintiff's Memo of Law, at pp. 18-19). That act is also unrelated to the ADA, and it applies only to federal government agencies. As Eataly is not a federal agency, it cannot be punished for failing to follow this statute.

POINT IV:- EATALY'S WEB SITE IS NOT A SERVICE OF ITS STORE AND THERE IS NO NEXUS BETWEEN THE STORES AND RESTAURANTS AND THE WEB SITE

Plaintiff argues that there is a "nexus" between Eataly's web site and its physical store locations, but this is not accurate. For there to be a nexus between the web site and the physical locations, the use of the web site must be necessary to avail oneself of the goods and services offered through the physical locations. That is not the case here. The stores and restaurants offer their own services and they offer them without any physical bars to the disabled. One need not use the web site to make a reservation or to enter the restaurant or food stores. Nor would a disabled person be unable to use means other then the web site to locate the restaurants and stores. Eataly may be contacted by phone. Its physical locations are in telephone books and its phone number may be accessed by dialing 411 on any telephone.

In support of his nexus argument, the plaintiff cites to *Rendon v. Valleycrest Products* (294 F.3d 1279, 1283 [11th Cir. 2002]). *Rendon, however,* is distinguishable. In *Rendon* the plaintiffs were attempting to participate in the "Who Wants to be a Millionaire" television contest. 294 F. 3d, at 1280. Contestants were selected for appearance on the program by use of an automated telephone answering system. *Id.* Aspiring contestants had to call a toll-free number on which a recorded message prompted them to answer a series of questions. *Id.* Callers recorded their answers to these questions by pressing the appropriate keys on their telephone keypads. *Id.* Callers who answered all of the questions correctly in the first round of the competition (the "fast finger process") were then subject to a random drawing to narrow the contestant field. *Id.* The plaintiffs, however, were hearing impaired and/or had upper body movement impairments making it difficult for them to record their answers in the time allowed. They sued the producers of the show, and the district court dismissed their complaint. *Id.* On appeal, the 11th Circuit reversed on the grounds that the plaintiffs had alleged that the telephone procedures had the effect of preventing them from the public services offered by the defendants at a physical, tangible location. 294 F. 3d, at 1283. The court reasoned as follows:

> "Plaintiffs' complaint clearly makes the requisite allegations, and moreover, a number of the assertions are uncontested for the purposes of the motion to dismiss now on appeal in this case. Defendants concede that Plaintiffs are disabled as defined by the ADA. Defendants also concede, and we agree, that the Millionaire show takes place at a public accommodation (a studio) within the meaning of 42 U.S.C. § 12181(7)(C) (covering theaters and other places of entertainment), and that the automatic process used to select contestants tends to 'screen out' many disabled individuals as described in section 12182(b)(2)(A)(i). Lastly, Defendants concede that the opportunity to appear on Millionaire and compete for one million dollars is a privilege or advantage as those terms are defined by the ADA (although they specifically refer to the Show as a 'good or service' of the studio, rather than as a privilege or advantage thereof." 294 F. 3d, at 1283.

Based on the 11th Circuit's reasoning, the nexus existed because the selection process led directly to the physical show. Accessibility of the selection process was therefore subject to the provisions of the ADA. In the case at bar, there is no similar nexus.

In *Access Now v. Southwest Airlines* (227 F. Supp. 2d 1312 [So. D. Fla. 2002]) the court used the same analysis as the 11th Circuit in *Rendon, supra,* to reject the plaintiff's claim that Southwest Airlines website was a place of public accommodation. The plaintiffs, *Access Now* (a non-profit, access advocacy organization) filed suit under Title III of the ADA alleging that Southwest's Internet website (Southwest.com) excluded blind persons from the use of Southwest's "virtual ticket counters". Southwest moved to dismiss plaintiffs' complaint on the grounds that Southwest.com was not a "place of public accommodation" as defined in Title III of the ADA. The court granted Southwest's motion to dismiss (227 F. Supp. 2d, at 1314) reasoning that neither Southwest's website nor its virtual ticket counters existed in any physical space. Therefore they could not be deemed places of public accommodation under Title III. 227 F. Supp. 2d, at 1321.

In the case at bar, Eataly.com exists only in cyberspace. To utilize the facilities at Eataly's restaurants and food stores, a person does not have to use the website. Unlike the plaintiffs in *Rendon, supra,* who could only access the services and privileges offered by the Who Wants to be a Millionaire Contest, the plaintiff in the case at bar is not so limited. He may still access the physical locations without the use of the website. Thus, the necessary nexus between the website and the restaurants or food stores does not exist. As such, the plaintiff's claims should be dismissed.

POINT V: THE COURT CANNOT COUNTENANCE PUNISHING EATALY FOR VIOLATING STANDARDS WHICH HAVE NEVER BEEN PROMULGATED AS REGULATIONS UNDER THE LAW

Also at issue in this lawsuit, is whether the court should punish a person (an individual or a business entity) for violating regulations that do not exist, that have never been published, that have never been subject to public comment, that have never been enacted pursuant to law or pursuant to a constitutionally valid form of regulation. The plaintiff argues that the court should do just this. The power to punish (like the power to tax[2]) is the power to destroy. That power is wisely and necessarily circumscribed by the constitution. While people and businesses might legitimately be punished for failing to comply with a regulation enacted pursuant to law, they should not be punished for failing to anticipate a possible future regulation or for failing to live up to standards that exist in the minds of future litigants or in the minds of those who wish to shape the law without regard to our constitutional mechanisms.

Congress long ago recognized the awesome power of unelected bureaucrats to pass regulations and to curtail that power, it enacted the Federal Register Act (44 U.S.C. §§ 1501 et seq) and the Administrative Procedure Act (5 U.S.C. §§ 551 et seq). The Administrative Procedure Act is also referred to as the "APA". Together these two enactments provide that proposed regulations must be published in the Federal Register so that all those effected by the proposed regulations have an opportunity "to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c). Section 552 of the APA also provides, in pertinent part, as follows:

[2] *McCulloch v. Maryland,* 17 U.S. 327 (1819) ("An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation.").

> "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published" (5 U.S.C. § 552[a]).

In the case at bar, the regulation that the plaintiff wants to enforce was never promulgated pursuant to the terms of the ACA. Thus, by necessity, the plaintiff advocates for a position that people and companies may be punished for not obeying guidelines that have never been codified. The court should not accept such a position as it would do violence to the due process protections afforded by the Fifth and Fourteenth Amendments. At a minimum, before a regulation can be enforced it must be enacted by a legitimate rule making authority, in a manner proscribed by law. A regulation must first be published in the Federal Register, so that the public (and not just an individual person or an individual business) has a chance to comment on the regulation. Only after providing for this public comment may a regulation be enforced. Here, the regulations that the plaintiff seeks to enforce have not been published in the Federal Register; they have not been subject to public comment; and they have not been enacted pursuant to our constitutional system. In short, they do not exist. For this reason, the plaintiff's action should be dismissed.

For a regulation to have the force of law, it must be published in the Federal Register so that the public has the opportunity to comment on it. These constitutional safeguards ensure that we do not live in a country where people can be punished at the mere whim of unelected bureaucrats – whether their intentions are noble or base.

Here, plaintiff alleges non-compliance with regulations that have not been promulgated pursuant to the laws of this Republic. The plaintiff's position is constitutionally untenable and repugnant to our system of governance.

Moreover, left undefined is the scope of this new, judicially created requirement, operators of websites in this district and others would likely be left to guess how to comply with the law, unless the court issues the equivalent of a regulation to give specific direction. If the court were to decide in favor of the plaintiff, would website operators be required to utilize one particular protocol or another? Would a website operator using WCAG 1.0 suddenly be afoul of the law by following the court's decision if a different standard is chosen? If a new (private) protocol is issued, would website operators be required to change again?[3] Deciding the case in the plaintiff's favor without the guidance of Congress or other proper rule maker would inevitably lead to ambiguity and confusion on the part of those now responsible for complying with the new law.

POINT VI: PLAINTIFF'S CAUSE OF ACTION UNDER NEW YORK'S EXECUTIVE LAW MUST ALSO FAIL

Plaintiff's cause of action under Section 296 of New York's Executive Law should also be dismissed. Article 15 of the Executive Law, which includes Section 296, is known as New York's Human Rights Law. Section 296 bars discrimination in "places of public accommodation". Section 296 provides, in pertinent part as follows:

> "It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status of any person, directly or indirectly, to refuse, withhold from

[3] We note that the WCAG is promulgated by a private entity, not a government entity.

> or deny to such person any of the accommodations, advantages, facilities or privileges thereof . . ."

Exec. § 296.2(a) (Consol. 2017). The clear language of the statute indicates that it is limited to places.

Key definitions for Human Rights Law (Article 15 of the Executive Law) are contained in Section 292. The term "places of public accommodation" is defined as follows:

> "The term 'place of public accommodation, resort or amusement' shall include . . . all places included in the meaning of such terms as: inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants, or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectionaries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores and establishments dealing with goods or services of any kind, dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments, barber shops, beauty parlors, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls, public rooms, public elevators, and any public areas of any building or structure . . ."

Exec. § 292(7) (Consol. 2017).

This definition list contained in Section 292(7) includes only physical "places" such as "building" and "structure". It does not include virtual spaces such as mail order catalogues, internet web sites, or broadcast promotions. Subsequently, the courts in New York have construed the term to apply to physical places offering services to the public. It has not been construed to apply to programs or offers not linked to physical places. *See, e.g., Ness v. Pan American World Airways,* 142 A.D.2d 233 (2d Dept. 1988).

In *Ness, supra,* a travel counselor sued Pan American Airways for violations of New York Executive Law § 296(2)(a) alleging that Pan Am discriminated against non-married travel agents in its travel program for travel agents and travel counselors. The program awarded free airline tickets to travel agents and counselors for certain levels of sales. Married agents and counselors could obtain identical ticket for their spouses at lower level of sales then unmarried agents. The plaintiff claimed that this was a violation of Section 296(2)(a) of the Executive Law which bans discrimination in providing services in any place of public accommodation. The trial court dismissed the plaintiff's complaint ruling that the travel program was not a place of public accommodation as defined by the statute. *Ness,* 142 A.D.2d, at 234. In upholding the dismissal of the plaintiff's complaint, the Appellate Division wrote

> "WorldClub does not bear any resemblance to the truly public and quasi-public places which are listed as illustrative examples in Executive Law § 292 (9). Nor, as the plaintiff contends, is it a 'travel or tour advisory service, agency or bureau' included within the statutory definition of 'place of public accommodation' . . . WorldClub is simply a mechanism by which Pan Am rewards travel agents for placing their clients on Pan Am flights; it does not provide any travel or tour advisory services to the public. The mere fact that the ultimate purpose of WorldClub is to encourage the booking of Pan Am flights does not lessen the fact that WorldClub is not a place of public accommodation. Unlike any of the establishments listed in Executive Law § 292(9), WorldClub does not provide either conveniences and/or services to the public." 142 A.D.2d 241.

In upholding the dismissal of the plaintiff's action, the *Ness* court held that "WorldClub does not bear any resemblance to the truly public and quasi-public places which are listed as illustrative examples in Executive Law § 292(9)." *See also, Carmelengo v. Phoenix Houses of*

N.Y., Inc., 54 A.D.3d 652 (1st Dept. 2008) (holding that a substance abuse program offered to prison inmates "does not qualify as a place or provider of public accommodation").

These rulings are in keeping with New York's general philosophy of strictly construing statutes that are in derogation of common law. *See, e.g., Morris v. Snappy Car Rental,* 84 N.Y.2d 21 (1994) ("it is axiomatic concerning legislative enactments in derogation of common law, and especially those creating liability where none previously existed, that they are deemed to abrogate the common law only to the extent required by the clear import of the statutory language"). In the case at bar, the New York legislature specifically limited places of public accommodation to physical places. Because the law created liability where none existed before, the courts should not expand the statute beyond its intended meaning.

POINT VII: PLAINTIFF'S CAUSE OF ACTION UNDER ARTICLE 4 OF THE NEW YORK CIVIL RIGHTS LAW MUST BE DISMISSED AS THAT LAW APPLIES ONLY TO DISCRIMINATION BASED ON RACE, CREED, COLOR OR NATIONAL ORIGIN

The plaintiff's third cause of action seeks relief pursuant to Article 4 of the New York Civil Rights Law (Civ. R. §§ 40, et seq). Article 4, however, is limited to barring discrimination based on race, creed, color or national origin. In pertinent part, Section 40 of the Civil Rights Law provides as follows:

> "All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of any places of public accommodations, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons. No person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any such place shall directly or indirectly refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or directly or indirectly publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of

> the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color or national origin, or that the patronage or custom thereat, of any person belonging to or purporting to be of any particular race, creed, color or national original [origin] ** is unwelcome, objectionable or not acceptable, desired or solicited."

Civ. R. § 40 (Consol. 2016).

Courts have held that Section 40 does not apply to people with disabilities. *See, e.g., Cave v. East Meadow Union Free School Dist.* 480 F. Supp. 2d 610 (E.D.N.Y. 2007) (holding that section 40 of the N.Y. Civil Rights law, "only protects persons from discrimination 'on account of race, creed, color or national origin'").

As Article 4 of the New York Civil Rights Law does not apply to discrimination, other than discrimination based on race, creed, color or national origin, the court should dismiss the plaintiff third cause of action which is based on Article 4.

POINT VIII: PLAINTIFF'S FOURTH CAUSE OF ACTION UNDER THE NEW YORK CITY CIVIL RIGHTS LAW SHOULD BE DISMISSED

Plaintiff has alleged violations of New York City Human Rights Law (N.Y.C. Administrative Code 8-102, et seq). Specifically, plaintiff alleges that Eataly has violated Sections 8-107(4) and (15). The City Civil Rights Law, like the State Civil Rights Law follows the form of the ADA. Section 8-107.44 provides, in pertinent part, as follows:

> "4. Public accommodations.
>
> a. It shall be an unlawful discriminatory practice for any person who is the owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation:
>
> 1. Because of any person's actual or perceived race, creed, color, national origin, age, gender, disability, marital status, partnership

> status, sexual orientation or alienage or citizenship status, directly or indirectly:
>
> (a) To refuse, withhold from or deny to such person the full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, services, facilities or privileges of the place or provider of public accommodation . . ."

NYC Administrative Code § 8-107.4.a (Consol. 2017). Section 8-102 defines the term "place or provider of public accommodation" as follows

> "The term 'place or provider of public accommodation' shall include providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind, and places, whether licensed or unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold, or otherwise made available . . ."

NYC Admin. Code § 8-102(9) (Consol. 2017).

The New York courts have so far declined to expand the definition of "public accommodation" to intangible things. *See, e.g., Matter of Bronx Environmental Health and Justice, Inc. v. N.Y. City Dep't of Environmental Protection,* 8 Misc. 3d 1002(A) (Sup. Ct., Queens Cty. 2005). There, the court held that it "explicitly declines to extend the definition of a public accommodation to the air quality of any particular borough or neighborhood within the City of New York." 8 Misc. 3d 1002(A).

To date, courts have held that the term "place or provider of public accommodation" as set forth in the New York City Human Rights Law applies to physical places and not to intangible or virtual spaces. No court of public record has applied the law to internet websites. As such, the court should follow the precedents set by other courts in construing Title III of the ADA.

CONCLUSION

In the case at bar, the plaintiff seeks to punish Eataly for failing to abide by regulations that do not exist. The plaintiff seeks to apply Title III of the ADA to an internet website, alleging that the website (which does not physically exist) as a "place of public accommodation". Because the website does not exist in any three dimensional place, he argues that it is linked to the services and goods sold at Eataly's physical locations. But there is no legal nexus between the website and the restaurants and stores. One need not use the website to find the stores and restaurants, to enter the stores and restaurants or to purchase the goods and services available at the stores and restaurants.

The plaintiff seeks to have this court rewrite Title III of the ADA to fit the plaintiff's preferred definition. But the language of the ADA is clear on its face and the court should not impose meanings on the law that the drafters did not intend.

Based on the facts of this case, based on the clear meaning of the legislation at issue and based on the fact that the plaintiff seeks to punish Eataly for failing to obey regulations that simply do not exist, the plaintiff's action should be dismissed.

Dated: White Plains, New York
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Respectfully submitted,

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